In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 511

JAMES HIGGINS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 362 F. 2d 462.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1966. A petition for rehearing was denied on August 2, 1966. The petition for a writ of certiorari was filed on September 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in limiting cross-examination and in excluding certain evidence.

STATEMENT

After trial by jury in the United States District Court for the Northern District of Illinois, petitioner was convicted under four counts of an indictment charging the sale and possession of heroin on two separate occasions in violation of 26 U.S.C. 4705(a) and 21 U.S.C. 174. On August 9, 1965, he was sentenced to imprisonment for a term of six years on each count, the terms to run concurrently (App. 4).[1] The court of appeals affirmed.

Federal Narcotics Agent Turnbou testified that, while working in an undercover capacity, he purchased heroin from petitioner on October 28 and November 10, 1964 (App. 8–10). Another agent, Vinsik, acting as a surveillant, observed Turnbou and petitioner on both occasions as they moved in and out of the places of meeting and sale (App. 17–18).

During the cross-examination of Agent Turnbou and the subsequent direct examination of petitioner, the defense sought unsuccessfully to introduce evidence (explained outside the presence of the jury in extensive argument and offer of proof) that at the time of petitioner's arrest on January 5, 1965, Agent Vinsik and another agent sought to enlist petitioner's services as an informer; that petitioner indicated at first that he would be willing to help but might change his mind; that he was charged with a violation of 26 U.S.C. 4704 (a) and released upon his own recognizance; that the agents telephoned him thereafter but he never called

[1] Record references are to the appellant's appendix in the court below.

them at the number he was given; and that he was indicted in March 1965 for a violation of 26 U.S.C. 4705 (a) (providing for more stringent penalties than 4704 (a)) after one of the agents said that he knew petitioner was not going to cooperate (See App. 10–11; 23–26).[2]

The trial court rejected the evidence as having no probative value[3] as to the truth or falsity of the testimony of Agent Turnbou concerning petitioner's activities some two months prior to the arrest.[4] Thus, the court limited the cross-examination of Turnbou to matters about which he testified on direct examination.

ARGUMENT

The excluded evidence was not, as petitioner claims, vital to his defense. As both courts below held, the evidence which petitioner sought to introduce had no probative value for impeaching the testimony of agent Turnbou that petitioner sold heroin to him on two occasions.[5] The jury could not have inferred that

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[2] The indictment charged petitioner with offenses occurring in October and November of 1964, several months *prior* to the events as to which petitioner unsuccessfully sought to introduce evidence.

[3] Petitioner has isolated portions of the court's reasoning during colloquy in claiming that the court excluded the evidence because of Narcotics Bureau policy considerations and its own conviction of petitioner's guilt. A reading of the transcript as a whole leaves no doubt that the evidence was rejected because of lack of probative value.

[4] The court observed, *inter alia*, that the reports of the agents made contemporaneously with the transactions were available to the defense for impeachment purposes.

[5] And, since petitioner was charged with offenses allegedly taking place several months *before* the events about which he sought to make an offer of proof, petitioner's evidence could have no direct relevance as to his guilt or innocence of the crimes alleged.

Turnbou fabricated the details of the transactions from the alleged fact that petitioner, after his arrest on charges growing therefrom, first accepted and then rejected a suggestion by other agents that he become an informer.[6] Rather, as the trial court reasoned, evidence as to the consideration of a "deal" would tend more to support an inference of petitioner's guilt than to suggest falsification of evidence by the government.

The extent of cross-examination rests in the sound discretion of the trial court. *District of Columbia* v. *Clawans,* 300 U.S. 617, 632; *United States* v. *Lawinski,* 195 F. 2d 1 (C.A. 7). The determination of whether given evidence is relevant to show bias, as well as the extent to which proof of the collateral matter of impeachment may extend, are matters within the discretion of the court. 3 Wigmore, *Evidence* (3d ed.) § 950, p. 504; McCormick, *Evidence* (1954 ed.) § 40, p. 86, *Id.,* § 152, pp. 317 et seq. Here there was no abuse of discretion.

The case of *United States* v. *Matot,* 146 F. 2d 197 (C.A. 2), relied upon by petitioner, is inapposite. In

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[6] As noted by the Seventh Circuit (Pet. App. 4a), petitioner was originally charged with essentially the same unlawful conduct of which he now stands convicted. As reasoned by the court below, since petitioner "was accused of this conduct prior to the time [he] had refused to become an informant," petitioner's "offer of proof concerning events subsequent to [his] arrest had no probative value for impeachment of Turnbou's testimony about [petitioner's] conduct and events which occurred prior to the time Turnbou had any motive to falsify resulting from bias or hostility toward [him]." *Ibid.*

that case the excluded evidence was an extra-judicial statement of the defendant bearing directly upon the issue of fraudulent intent and might have made the difference between a finding of guilt and innocence. Here the excluded evidence had no logical relation either to innocence or credibility.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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